

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE MICHAEL WILLIAMS,

Defendant-Appellant.

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UNPUBLISHED

October 2, 2001

No. 218924

Wayne Circuit Court

Criminal Division

LC No. 98-003739

Before: Bandstra, C.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(c). He was sentenced to concurrent terms of ten to fifteen years' imprisonment for each count. He appeals as of right. We affirm.

Defendant and the victim were residents at a foster care facility for physically and mentally disabled adults. The victim has profound Down's Syndrome and is incapable of taking care of his basic needs. He speaks only a few words, and was unable to testify. On December 4, 1997, a facility employee found the victim in an unusual physical position and in apparent discomfort. She questioned defendant, who eventually admitted that he had committed anal and oral sexual penetration of the victim. Lacerations were found in the victim's anus and on his left tonsil, and semen found in the victim's underpants matched defendant.<sup>1</sup> Defendant was convicted as described above.

On appeal, defendant contends that the corpus delicti of the oral penetration count was not established before the admission of his incriminating statements. Our Supreme Court has opined that proof of the corpus delicti is required before the prosecutor may introduce an inculpatory statement. *People v McMahan*, 451 Mich 543, 548; 548 NW2d 199 (1996). The stated purposes of this rule are twofold: (1) to prevent a conviction where no crime was actually committed, and (2) to minimize the weight of a confession by requiring collateral evidence to also be introduced. *Id.*, at 548-549 (quoting *People v Williams*, 422 Mich 381, 388; 373 NW2d

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<sup>1</sup> The DNA expert testified that there was "one chance in a billion" that defendant was not the source of the semen.

567 (1985) and Hall, General Principles of Criminal Law (2d ed), ch VII, p 226). The rule specifically provides that a defendant's confession may not be admitted, unless there is other direct or circumstantial evidence establishing a specific injury and criminal agency as the source of the injury. *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995). The rule is satisfied simply by showing that "the crime was committed by *someone*." *Id.*, at 270.

We note, however, that defendant raised this issue below, but then agreed to the trial court's conclusion that the issue was moot. In other words, defendant's objection to the prosecutor's purported failure to satisfy the corpus delicti rule was essentially withdrawn. Our Supreme Court has opined that express approval of a trial court's resolution of an issue constitutes a waiver that extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Accordingly, we could simply decline to consider this issue. Nevertheless, we note that the facility worker testified that the victim appeared to be spitting up a white liquid when she found him. As noted above, lacerations were found in the victim's left tonsil.<sup>2</sup> We believe that this evidence provides sufficient circumstantial evidence to establish that oral penetration occurred independent of defendant's statements.

Defendant also challenges the trial court's denial of his motion for a directed verdict, specifically in regard to the oral penetration count. A directed verdict of acquittal should be granted where there is insufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). "If the evidence presented by the prosecution in the light most favorable to the prosecution, up to the time the motion is made, is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt, a directed verdict or judgment of acquittal must be entered." *Id.* In addition to the testimony described above, we note that defendant stated that he ejaculated in the victim's mouth. MCL 750.520d(1)(c) further requires that the accused know that the victim is "mentally incapable, mentally incapacitated or physically helpless." The facility employee testified that the victim required assistance to complete daily activities, such as using the toilet, and that he was essentially unable to communicate. We would also note that defendant initially lied when questioned by the facility employee, and that he eventually stated that he was sorry and expressed concern about being in trouble. We believe that this evidence, viewed in a light most favorable to the prosecution, provides sufficient evidence for a reasonable trier of fact to conclude that defendant knowingly engaged in oral penetration of a victim contrary to MCL 750.520d(1)(c).<sup>3</sup> Consequently, we conclude that the trial court correctly denied defendant's motion for a directed verdict.

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<sup>2</sup> To the extent that this testimony came after defendant's incriminating statements were introduced, we note that a successful objection by defendant would have simply prevented the introduction of his statements until after this evidence was introduced. Because his statements would have ultimately been admissible, we are not persuaded that defendant was denied a fair trial based solely an arguably premature introduction.

<sup>3</sup> Because third-degree criminal sexual conduct is a general intent crime, all that must be proven is that defendant committed a proscribed sexual act. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996).

Defendant also contends that he was denied his constitutional right to effective assistance of counsel. In *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), our Supreme Court opined:

For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id.* at 167, 560 NW2d 600.

Where, as here, a defendant fails to raise the issue of ineffective assistance of counsel by a motion for a new trial or an evidentiary hearing, appellate review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

We believe that the record supports defendant's assertion that his counsel's performance fell below an objective standard of reasonableness. The presumption that counsel's action constituted sound trial strategy is not broad enough to cover defense counsel's rather obvious failure to fully understand the burden of proof with respect to an insanity defense.<sup>4</sup> Indeed, the legal insanity statute was amended in 1994 to place the burden on a defendant to prove his or her insanity. MCL 768.21a(3).

However, MCL 768.21a(2) provides that a person is legally insane if "that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." Defendant presented evidence<sup>5</sup> that he had an IQ of 52, and that he suffered from mild mental retardation and "under-socialized conduct disorder." Nevertheless, defendant did not present evidence indicating that he was unable to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law.

The record reveals that defendant told plaintiff's psychiatric expert that a voice told him to engage in the misconduct. However, the expert opined that this did not interfere with defendant's ability to form the requisite intent to commit the crime because he had never heard voices before, nor did he indicate that he was compelled to follow the purported voice's directives. The expert noted that he reviewed as many as ten "full battery psychological

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<sup>4</sup> We are not persuaded, however, that defense counsel's performance was otherwise unreasonable.

<sup>5</sup> The parties stipulated to the admission of this evidence, although the individual who tested defendant and reached these conclusions was not formally qualified as an expert.

examinations,” and that defendant had no history of hallucinations or any other psychoses. In addition, the facility employee testified that defendant, after admitting to the incident, stated that he was thinking about his girlfriend, and that he—referring to the sexual misconduct—“wanted it,” “needed it,” and “had to have it.”

Moreover, we note that defendant, when initially questioned by the facility employee, denied engaging in any misconduct. Then, after admitting to the misconduct, defendant expressed concern about the staff being mad at him or having to go to jail. We believe that these facts suggest that defendant was aware that there would be consequences to his misconduct. Again, the pretrial psychiatric evaluation prepared by plaintiff’s expert stated that there were “no indications of significant disorder of thought or mood that would substantially interfere with his [defendant’s] ability to make socially appropriate judgments or conform his behavior to the requirements of the law.” Ultimately, we are not persuaded that defendant lacked the ability to appreciate the wrongfulness of his conduct or appropriately conform his behavior to the law. In the absence of sufficient evidence to support a conclusion that he was legally insane, we are unable to conclude that defendant was prejudiced by his counsel’s performance. Consequently, defendant was not deprived of his constitutional right to effective assistance of counsel.<sup>6</sup>

Finally, defendant contends that the trial court abused its discretion by imposing a sentence in excess of the guidelines recommendation.<sup>7</sup> The sentencing guidelines recommendation was 36 to 72 months’ imprisonment; however, the trial court sentenced defendant to ten to fifteen years’ imprisonment.

It is well established a sentence must be proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636, 651-652; 461 NW2d 1 (1990). In *People v Crear*, 242 Mich App 158, 170; 618 NW2d 91 (2000), we opined as follows:

While departures from the guidelines are permitted, they are subject to careful scrutiny on appeal . . . . A departure from the recommended range indicates a possibility that a sentence may be disproportionate, although the primary consideration must be whether the sentence reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). When a court departs from the guidelines because of the special characteristics of the offense or the offender, it must specifically explain those characteristics. *People v Stone*, 195 Mich App 600, 608; 491 NW2d 628 (1992). Although a court may depart from the guidelines range on the basis of factors already considered in the

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<sup>6</sup> We would also note that defense counsel questioned the prosecution’s psychiatric expert at length. Nevertheless, this questioning could not undermine the extensive, objective history of psychological examinations upon which the expert relied. Moreover, in light of defendant’s damaging admissions (made shortly after he committed the acts) that he knew he could be faulted for them, we do not think that—even if an expert could be found to testify in favor of an insanity defense—there is a reasonable probability that the trier of fact would have accepted the defense.

<sup>7</sup> Because the crimes took place in 1997, the Legislative sentencing guidelines are inapplicable.

guidelines calculations, such deviations must be made with caution. *People v Rocky*, 237 Mich App 74, 79; 601 NW2d 887 (1999).

The key test of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter. *People v Cain*, 238 Mich App 95, 132; 605 NW2d 28 (1999) (quoting *Houston, supra*, at 320)).

In support of its decision to make an upward departure from the sentencing guidelines, the trial court found that defendant was a “sexual predator” and a threat to young and helpless persons. The record suggests that defendant had previously engaged in sexual misconduct. The trial court further found that the instant crimes were “horrendous,” “vicious,” and “brutal.” Indeed, the instant crimes involved sexual misconduct against a severely impaired individual. Thus, even though the sentence constituted an upward departure, we are not persuaded that it was disproportionate to the circumstances surrounding this offense or offender.

Affirmed.

/s/ Richard A. Bandstra  
/s/ Donald S. Owens